No. 93-714

IN THE
Supreme Court of the United States

October Term, 1993

U.S. BANCORP MORTGAGE COMPANY,
Petitioner,
v.
BONNER MALL PARTNERSHIP,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY IN SUPPORT OF REQUEST TO VACATE DECISION BELOW

Bradford Anderson*
Dale G. Higer
David B. Levant
**Counsel of Record*
STOEL RIVES BOLEY
JONES & GREY
3600 One Union Square
600 University Street
Seattle, WA 98101-3197
(206) 624-0900
Counsel for Petitioner

6 pp

The issue before the Court is whether, if the Court dismisses this case as moot, the Court should exercise its discretion, in accordance with its usual practice, to vacate the decision below.

The central teaching of United States v. Munsingwear, Inc., 340 U.S. 36 (1950), is that vacatur should be used "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." Id. at 41. Bonner ignores this principle and urges the Court to restrict its established practice in moot cases of reversing or vacating the judgment below, id. at 39, to only those circumstances in which review was prevented through "happenstance" over which the petitioner has no control. Bonner overstates the importance of the Court's reference to "happenstance" in the Munsingwear case. In that case it appears that the party seeking vacatur (the United States) was also the party responsible for the case becoming moot. See id. at 37. Nevertheless, nothing in the Munsingwear decision suggests that the United States' involvement in the events causing the case to become moot had

any effect on the decision whether to vacate the decision below.

Bonner also goes too far in proposing that vacatur be denied in all cases that are settled. The Court has broad power to vacate any order brought before it for review, "as may be just under the circumstances." 28 U.S.C. § 2106. The decision whether to vacate is thus a discretionary power to be exercised on a case-by-case basis.

U.S. Bancorp recognizes that vacatur may not be appropriate in all cases. For example, in Karcher v. May, 484 U.S. 72 (1987), the appellants affirmatively withdrew their appeal. Id. at 76. And in certain lower court cases, see, e.g., Manufacturers Hanover Trust Co. v. Yanakas, 11 F.3d 381 (2d Cir. 1993), a party with "deep pockets" may have attempted to use settlement as a device to vitiate an adverse precedent.

In this case, however, the petitioner has not stipulated to or moved for dismissal of the case. Rather, U.S. Bancorp has agreed with Bonner that recent events have eliminated for

the time being the need for the Court's review of the Ninth Circuit's decision in this case. This case thus resembles Munsingwear, not Karcher.

Nor is there any suggestion that the settlement in this case was calculated to vitiate the decision below. The settlement was the product of months of negotiations that commenced before the decision below was issued. The settlement was without regard to its possible effect on legal precedent and was in no way an attempt nullify an unfavorable precedent. This is demonstrated by the fact that the settlement was concluded after the Court granted certiorari.

The facts of this case particularly favor vacatur. The decision below appears to be infected with a clear and substantial error. In reaching its decision, the Ninth Circuit appears to have relied on its belief that U.S. Bancorp's reading of Section 1129(b) of the Bankruptcy Code would render the "on account of" phrase superfluous. See Pet. App. A40-41. The Court of Appeals failed to consider the possible meaning of the phrase advanced by U.S. Bancorp. See Brief of

Petitioner at 23-24. The Court need not reach the merits of this case to recognize that the Court of Appeals rendered its decision without this information.[1] Regardless of whether the simple meaning of the "on account of" phrase advanced by U.S. Bancorp is correct, the fact remains that the Court of Appeals was completely unaware of a possible meaning or purpose of the phrase when it decided this case.

In addition, despite the appearance of mootness at this time, it is entirely possible that survival of the new value exception will again become an issue between the parties. Confirmation of a plan does not constitute a final order ending the bankruptcy court's supervision of a case. If Bonner fails to fulfill its obligations under the Third Amended Plan of Reorganization--which runs for five years--the parties would be back in the position they were in before U.S. Bancorp consented to the plan. Because U.S. Bancorp has not consented to and will not give advance consent to any possible

---

1 The meaning of the phrase was first raised by the Court of Appeals at oral argument, and therefore was not addressed in U.S. Bancorp's briefs below.

plan of reorganization, it is likely that the question on which the Court has granted review would arise again at that time. Accordingly, the Court should "clear[] the path for future relitigation of the issues between the parties," Munsingwear, 340 U.S. at 39, by vacating the judgment below.

Respectfully submitted,

BRADFORD ANDERSON
Attorneys for Petitioners
U.S. Bancorp Mortgage
Company

MARCH 17, 1994